BRB No. 08-0432

B.A.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	DATE ISSUED: 11/25/2008
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Dania Beach, Florida, for claimant.

Christopher P. Boyd and Bonnie J. Murdoch (Taylor, Day, Currie, Boyd & Johnson), Jacksonville, Florida, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2004-LHC-00660) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To recapitulate, claimant was hired by employer in August 2001 as a project manager. He was assigned in September 2001 to work on a beach renourishment project in Strathmere, New Jersey. After the attacks on the World Trade Center (WTC) on September 11, 2001, claimant asserted that he was transferred by employer at his request to assist in the loading of debris from the WTC site onto barges at Pier 6, and that he returned to the Strathmere project after a couple of weeks. Claimant quit working for employer in January 2002. Claimant alleged that he sustained psychological and gastrointestinal injuries arising from his employment at the WTC site and that he is entitled to compensation for temporary total disability commencing in April 2002. Tr. at 15. Employer controverted the claim, contending that claimant never worked for employer at the WTC site, and that, therefore, the alleged injuries are not within the Act's coverage, 33 U.S.C. §§902(3), 903(a), 920(a). Employer also contended that claimant failed to provide timely notice of his injury or to timely file his claim, 33 U.S.C. §§912, 913.

In his initial decision, the administrative law judge found that claimant should have been aware in September 2001 of the relationship between his physical and psychological symptoms and the work he allegedly performed for employer at the WTC. The administrative law judge thus found that claimant's filing of his claim on February 10, 2003, was untimely as a notice of injury pursuant to Section 12(a) of the Act, 33 U.S.C. §912(a). The administrative law judge also found that employer did not have knowledge of claimant's injury within the filing period and was prejudiced by claimant's untimely notice. *See* 33 U.S.C. §912(d)(1), (2). Accordingly, the administrative law judge denied the claim as time-barred pursuant to Section 12. Claimant appealed the administrative law judge's denial of the claim.

The Board affirmed the administrative law judge's finding that claimant's notice of injury was untimely pursuant to Section 12(a). However, the Board vacated the administrative law judge's finding that employer was prejudiced by the untimely written notice of injury, as he did not cite any specific evidence supporting his conclusion. The Board remanded the case for the administrative law judge to fully address the evidence of record concerning any prejudice to employer that ensued due to claimant's untimely notice of injury. *[B.A.] v. Weeks Marine, Inc.*, BRB No. 06-0588 (Mar. 28, 2007) (unpub.). The Board also directed the administrative law judge to address the issues necessary to a determination of claimant's entitlement to medical benefits, as medical benefits are never time-barred.

In his decision on remand, the administrative law judge found insufficient employer's evidence of prejudice due to claimant's failure to timely provide notice of his alleged work injury. Nonetheless, the administrative law judge found claimant's claim untimely filed pursuant to Section 13(a), 33 U.S.C. §913(a). The administrative law

judge found that claimant was an employee of employer, but that employer never assigned claimant to work at the WTC site. Therefore, the administrative law judge found that claimant did not make a *prima facie* case that his claim falls within the provisions of the Act. 33 U.S.C. §920(a); *see also* 33 U.S.C. §§902(3), 903(a). The administrative law judge thus concluded that claimant's injuries are not work-related,[1] finding, in addition, that employer introduced medical evidence refuting the work-relatedness of claimant's conditions. Accordingly, the claim for benefits was denied.

On appeal, claimant challenges the administrative law judge's findings that his claim was not timely filed, that he is not covered under the Act, and that his psychiatric and gastrointestinal conditions are not related to his employment.[2] Employer responds, urging affirmance of the administrative law judge's findings and the denial of the claim. We will first address the administrative law judge's finding that claimant's psychological and gastrointestinal conditions are not related to his employment as affirmance on this issue would dispose of the claim for both disability and medical benefits.

Claimant challenges the administrative law judge's finding that claimant did not work at the WTC site as an employee of employer. The administrative law judge found that claimant was not assigned by employer to work on its project loading debris from the WTC site onto barges. Initially, the administrative law judge found that claimant's general testimony was "inconsistent throughout" and that claimant lacked credibility. Decision and Order on Remand at 6. Specifically, the administrative law judge credited evidence refuting claimant's allegation that he was working at the WTC site as an employee of employer. The administrative law judge found that employer's time sheets for various periods from September 20 to October 8, 2001, do not list claimant as working or being scheduled to work at the WTC. Tr. at 328; CX S at 47-48; EX T. The

[1] The administrative law judge found that claimant has been diagnosed with post-traumatic stress disorder, depression, bi-polar disorder, and gastrointestinal problems. Decision and Order on Remand at 10, 12.

[2] In his Reply Brief, claimant asserts the administrative law judge erred by not following the dictate of the Board to conduct a hearing on remand and by relying on his memory to assess claimant's credibility two and one-half years after the formal hearing. The Board, however, did not instruct the administrative law judge to reopen the record and conduct a hearing on remand. Moreover, on remand claimant did not request a second hearing. *See Jukic v. American Stevedoring, Inc.*, 39 BRBS 95 (2005). In fact, claimant argued in his motion to strike employer's submission of evidence on remand that the Board instructed the administrative law judge solely to reevaluate the existing evidence of record. Motion to Strike Employer/Carrier's Remand Brief and Attached Exhibits at 3-4 (*see also* December 13, 2007 cover letter to motion).

administrative law judge rejected claimant's reliance on his presence on a barge at Pier 6 on September 26, 2001, because claimant testified that he was on the site that day to take personal belongings to a foreman. EX LL at 146. The administrative law judge rejected claimant's testimony that he began working on the WTC project after requesting the assignment from employer's Senior Vice President for Maritime Services, George Wittich. The administrative law judge credited Mr. Wittich's deposition testimony that he has no recollection of meeting claimant and that claimant was never reassigned from the Strathmere project to the WTC. CX S at 11, 23-24; EX SS at 3, exs B, C. The administrative law judge also found claimant's testimony that he began off-loading debris on September 13, 2001, was not credible because the crane needed to off-load structural steel onto employer's barges did not arrive until September 17, 2001. Tr. at 322-324; EXs J, PP at 49-52, QQ at 64.

The administrative law judge rejected claimant's reliance on a memorandum he received from Mr. Wittich, which was distributed to supervisory personnel on September 19, 2001. The administrative law judge credited Mr. Wittich's testimony that he sent the memorandum to everyone he intended to assign as supervisors to the WTC project, but he subsequently decided not to assign claimant. Tr. at 340-342; CX S at 29-31, 37-39, 43-45. Moreover, claimant was not included on the distribution list for similar memoranda regarding the WTC project that employer sent to supervisory personnel on September 13, 21, and October 1, 2001. EXs T, SS. The administrative law judge found claimant's testimony that he was the night foreman on the WTC project until September 19, 2001, contradicted by the testimony of Obis Wohl, who was the foreman at Pier 6, that he never scheduled claimant to work there. EX QQ at 10, 48, 60-61, 64-68. The administrative law judge found Mr. Wohl's testimony corroborated by Christopher Devlin, a night-shift superintendent. EX PP at 9-10, 16, 45-46, 52, 61. The administrative law judge found that the testimony of Rick Addison, a supervisor, that he saw claimant traveling on all-terrain vehicles ("gators") establishes only that claimant was present at the WTC site. The administrative law judge credited the testimony of Thomas Langan, who was responsible for all vehicles owned by employer, that employer does not own "gators." Tr. at 339-340. The administrative law judge also credited Mr. Addison's deposition testimony that he never saw claimant working on Pier 6 or at any other pier, and that he had no knowledge of claimant's purpose at the WTC. CX T at 34, 40.

The administrative law judge rejected claimant's reliance on his overnight stay at the Swan Motel, which employer used to house employees working at the WTC. The administrative law judge credited Mr. Langan's testimony that the motel was also used to house employees working on other projects, and that claimant's stay there on September 24, 2001, was paid through employer's dredging division and not through the WTC project. Tr. at 331-332; CX S at 46-47. Finally, the administrative law judge rejected

claimant's reliance on his obtaining a WTC badge. CX A. The administrative law judge credited Mr. Langan's deposition testimony that these badges were not distributed by employer but by New York City, and were easy to obtain during the first few weeks after September 11, 2001. CX R at 25-26. Based on these findings, the administrative law judge concluded that claimant was not engaged in any work for employer at the WTC site. Decision and Order on Remand at 8. As a result of these findings, the administrative law judge concluded, *inter alia*, that claimant did not make out a *prima facie* case for the application of Section 20(a) of the Act, which provides a presumption that the claim comes within the provisions of the Act, in the absence of substantial evidence to the contrary.[3]

A claimant's injury "arises out of the employment when it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed." *Fazio v. Cardillo*, 109 F.2d 835, 836 (D.C. Cir. 1940). It is claimant's burden to establish by a preponderance of the evidence that he sustained an accidental injury or was exposed to injurious working conditions during his employment that could have caused the maladies of which he complains. *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). "Arising 'out of' and 'in the course of' employment are separate elements: the former refers to injury causation; the latter refers to the time, place, and circumstances of the injury. [footnote omitted]. Not only must the injury have been caused by the employment, it also must have arisen during the employment." *U.S. Industries/Federal Sheet Metal*, 455 U.S. at 615, 14 BRBS at 633. If claimant establishes he sustained a harm and that an accident at work occurred or working conditions existed that could have caused the harm, Section 20(a) of the Act applies to presume that the harm is work-related. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT).

Substantial evidence supports the administrative law judge's finding that employer did not transfer or otherwise assign claimant to work at the WTC. Therefore, any injuries claimant may have sustained due to his presence at the site did not occur in the course of his employment, and claimant did not establish any conditions of his employment that could have caused his injuries. *Id.; see also Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989), *on remand from* 841 F.2d 1085, 21 BRBS

[3] The administrative law judge also found that employer introduced substantial evidence to the contrary, as Dr. Cooley stated claimant does not have post-traumatic stress disorder, is malingering, and that his bi-polar disorder is not related to his employment. Dr. Krueger opined that claimant's gastrointestinal problem is limited to mild inflammation that is not related to any toxic exposure at the WTC site.

18(CRT) (11th Cir. 1988), *rev'g* 20 BRBS 104 (1987). The administrative law judge's rejection of claimant's testimony regarding his job assignment is not "inherently incredible or patently unreasonable," as the administrative law judge properly relied on the inconsistencies in the testimony. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see, e.g.*, Decision and Order on Remand at 11 n.5. Moreover, the administrative law judge rationally credited the evidence presented by employer establishing that claimant was not dispatched to perform any work on employer's behalf at the WTC site. *Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). That the evidence is susceptible to other findings or inferences does not demonstrate error in the administrative law judge's decision. *See, e.g., Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this case, the administrative law judge rationally found that claimant was not at the WTC site at the behest of employer. Claimant thus did not meet his burden of establishing the alleged working conditions which formed the basis for his claim in fact occurred. As claimant failed to prove this essential element of his *prima facie* case, we affirm the denial of compensation and medical benefits.[4] *U.S. Industries*, 455 U.S. 608, 14 BRBS 631.

[4] Thus, we need not address claimant's challenge to the administrative law judge's other findings.

Accordingly, the administrative law judge's Decision and Order on Remand denying the claim for benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge